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No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae North American Securities Administrators Association, Inc. (NASAA), respectfully submits this brief in support of Petitioner and urges the Court to reverse the decision of the court of appeals for two reasons. First, the decision below eliminates important consumer protections under state banking law at a time when the financial services industry obviously requires vastly more oversight and enforcement, not less. Second, the decision endows the Office of the Comptroller of the Currency (OCC) – and, by extension, other federal agencies – with far too much power to preempt state laws through mere rulemaking. As argued *infra*, this is not what the Framers of our Constitution or our elected representatives in Congress intended, nor does it serve the public interest.

NASAA is the nonprofit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. Formed in 1919, it is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. These agencies are responsible for regulating

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters on file with the Court.

securities transactions under state law. Their fundamental mission is protecting consumers who purchase securities or investment advice, and their jurisdiction extends to a wide variety of issuers and intermediaries – many of them bank affiliates – who offer and sell securities to the public.

State securities regulators are counterparts to state banking regulators, and their core functions are essentially the same: licensing industry participants, examining firms, investigating violations of state law, filing enforcement actions when appropriate, and educating the public about fraud and abuse.[2]

NASAA offers training programs for attorneys and examiners, coordinates multi-state enforcement actions, publishes investor education materials, presents the views of its members in testimony before Congress, and, as *amicus curiae*, represents its membership's position in significant legal proceedings involving the regulation of financial services. NASAA and its members share with Petitioner the overarching goal of protecting consumers from financial fraud and abuse.

The decision of the court below strikes a heavy blow against consumer protection by enjoining Petitioner from even investigating evidence of racially discriminatory lending practices by several national

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[2] All of these activities under state law parallel and complement the regulation of securities under federal law by the Securities and Exchange Commission (SEC). This state/federal partnership strengthens investor protections while at the same time affording the securities industry and our capital markets ample room in which to operate.

banks and their operating subsidiaries. Worse, in upholding OCC's unprecedented preemptive rule, the court of appeals effectively insulates national banks and their affiliates from accountability under state law for a wide range of illegal banking practices. The states' hands are tied, consumers are victimized, and the guilty banks avoid detection and prosecution altogether.

Allowing OCC or any other federal agency to wield such power poses a serious threat to state regulation and consumer protection. Indeed, OCC's tenacious and successful effort to expand federal preemption via rulemaking raises the specter that the agency will seek to exercise this power in other areas, including securities, notwithstanding manifest congressional intent in the Gramm-Leach-Bliley Act[3] to preserve the states' regulatory and enforcement jurisdiction over financial subsidiaries that engage in securities transactions. *See* 15 U.S.C. § 6701(f). For example, an OCC advisory letter issued after GLBA was enacted observes that even where federal statutes "specifically give enforcement authority to state attorneys general, . . . issues may arise as to the appropriate role of a state official with respect to a national bank's activities." OCC Advisory Letter 2002-9 at 1, n.1 (Nov. 25, 2002), *available at,* http://www.occ.treas.gov/ftp/advisory/2002-9.doc.

State securities regulators, state banking regulators, and state attorneys general all play a vital role in protecting consumers from fraud and abuse,

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[3] Pub. L. No. 106-102, 113 Stat. 1338 (1999) [hereinafter "GLBA"].

and they do so without disrupting or impeding concurrent federal regulation of our financial services industry. To the extent state regulators are precluded from exercising their investigative and enforcement powers, the public suffers. NASAA, therefore, has an interest in supporting reversal of the decision below.

INTRODUCTION

This case arises as part of a sequence of cases in recent years in which OCC has, through unprecedented assertions of preemptive authority, usurped the sovereign power of the States and disrupted the federal-state balance that has been a hallmark of the dual banking system since 1863, when national banks were first created. Yet nothing in the National Bank Act authorizes OCC's encroachments into traditional areas of state authority.[4] Those incursions have been by regulatory fiat, in an industry which this Court has recognized is, both "as a matter of history and as a matter of present commercial reality, * * * of *profound local concern*." *Lewis v. BT*

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[4] On the contrary, from the creation of the national banking system, the prevailing characteristic of our dual banking system has been that of concurrent regulation. Indeed, the National Bank Act contains only one provision that can be read as expressly preempting state law, 12 U.S.C. § 85, several provisions that require OCC to defer to (and abide by) the policy choice made by state law, *e.g.,* 12 U.S.C. §§ 36, 92a, 214c, and an overall structure and tone contemplating the coexistence of the laws of the state and federal sovereigns, as OCC's own regulations have recognized. *See, e.g.,* 12 C.F.R. § 7.2000(b) (permitting national banks, where not inconsistent with federal banking laws and regulations, to choose corporate governance procedures from a menu of state corporate law options).

Inv. Managers, Inc., 447 U.S. 27, 38 (1980) (emphasis added).

Nevertheless, since the turn of the millennium, OCC has been remarkably successful with a national litigation strategy of intervening in the lower federal courts (either as a party or as *amicus curiae*) around the country and persuading them to accord *Chevron* deference[5] where none is due, to ignore nearly 150 years of history in our dual banking system, and to disregard this Court's traditional presumption against preemption. So successful was that campaign that OCC was able to persuade this Court to extend the agency's preemptive reach to state-chartered operating subsidiaries of national banks. *Watters v. Wachovia Bank*, 550 U.S. 1 (2007).

OCC has demonstrated a resolve to amass exclusive regulatory jurisdiction over banks and their affiliates to a degree never intended by Congress.

> In recent years, the OCC has embarked on an aggressive campaign to declare that state laws and enforcement efforts are preempted if they have any impact on a national bank's activities. The OCC has zealously pushed its preemption agenda into areas where the States have exercised enforcement and regulatory authority without controversy for years.

Review of the National Bank Preemption Rules: Hearings Before the Senate Committee on Banking,

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[5] *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Housing, and Urban Affairs, 108th Cong., 2d Sess. (Apr. 7, 2004) (opening statement of Sen. Paul S. Sarbanes).

Tragically, OCC's strategy has had catastrophic effects. Far from creating an orderly world in which well-supervised national banks and their affiliates, operating under a uniform system of laws and regulations which their federal regulators competently enforce, empower individuals and businesses and fuel the economy through prudent lending, we have chaos and economic meltdown. Unrestrained by any necessity to comply with reasonable state laws regulating mortgage lending and preventing predatory and other types of discriminatory lending, the large banks, abetted by OCC's preemption crusade, have reaped the whirlwind. Most of them would have failed if the federal government had not provided a massive, taxpayer-funded bailout.[6]

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[6] The laxity of federal regulation has been amply documented in the media during the current economic meltdown. The extent of regulatory short-sightedness can be illustrated by the fact that the foundering Citigroup would have been allowed to acquire the insolvent victor in the *Watters* case, Wachovia Bank, N.A., had not Wells Fargo intervened with a higher bid. That acquisition now threatens Wells Fargo's financial condition, as the California bank posted a $2.55 billion fourth quarter loss for 2008. *See* Eric Dash & Michael de la Merced, *Wachovia Acquisition Drags Down Wells Fargo*, N.Y. TIMES, Jan. 29, 2009, at B3. One can only imagine the resulting donnybrook had Citigroup consummated the Wachovia acquisition. Similar troubles now afflict Bank of America, which the regulators allowed to acquire two insolvent behemoths, Countrywide Financial and Merrill Lynch. *See, e.g.,* Gretchen Morgenson, *The End of Banking As We Know It,* N.Y. TIMES, Jan. 18, 2009, BU Section (Bank of America "fessed up that its deals now need taxpayer backing": federal government invested an

Not content with aggrandizing its power through substantive preemption regulations, OCC seeks further to expand its reach by "enforcement preemption" through an overbroad, and revisionist, interpretation of the visitorial powers statute, 12 U.S.C. § 484. That statute provides, in pertinent part, "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress . . . ."

Although national banks have always been subject to state law,[7] OCC has, by regulatory fiat, largely eviscerated the "courts of justice" exception – even as to state laws which, as in the instant case, the agency concedes are *not* substantively preempted. In 2004, OCC, as an integral part of its assault on state regulation via preemption, amended its regulations in order to "clarify" the application of the "courts of

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additional $20 billion (after the $25 billion last fall) and agreed to guarantee more than $100 billion of imperiled assets). One expert has opined that the financial system will need another $1 trillion in common equity, *on top of* the $700 billion in the Troubled Asset Relief Program last fall and President Obama's recent, and even larger, stimulus plan. *Id.*

[7] Well over a century of consistent case law supports this view. *See, e.g., Anderson Nat'l Bank v. Luckett,* 321 U.S. 233, 244-54 (1944); *First Nat'l Bank in St. Louis v. Missouri,* 263 U.S. 640, 656 (1924); *Guthrie v. Harkness,* 199 U.S. 148, 157 (1905); *McClellan v. Chipman*, 164 U.S. 347, 359 (1896); *Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896); *Nat'l Bank v. Commonwealth of Kentucky,* 76 U.S. (9 Wall.) 353, 361-62 (1869). *See also Atherton v. FDIC,* 519 U.S. 213, 222-23 (1997) (applying similar principles to federally chartered thrift institutions); O'*Melveny & Myers v. FDIC,* 512 U.S. 79, 85 (1994) (*simile*).

justice" exception. Office of the Comptroller of the Currency, Bank Activities and Operations, 69 Fed. Reg. 1895 (2004). The amendment was intended less as a clarification than as a *nullification* of enforcement authority by state officials and provided (*ipse dixit*) that "[the courts of justice exception] does not permit a State to use the courts to inspect, examine, regulate, or compel action by a national bank. Instead, the exception simply permits private litigants to obtain discovery and other judicial relief in actions involving national banks." *Id.* at 1900 (codified at 12 C.F.R. § 7.4000(b)(2)). The court below affirmed the validity of this interpretation on a *Chevron* deference rationale. *Cuomo v. The Clearing House Ass'n,* 510 F.3d 105 (2d Cir. 2007). The dissenting judge challenged this conclusion and observed that while national banks are federal instrumentalities, "they are also privately owned businesses headquartered in a particular state and, in general, subject to the laws of that state." *Id.* at 128 (Cardamone, J., concurring in part and dissenting in part) (citing *Commonwealth of Kentucky, supra*; *Guthrie v. Harkness, supra*; Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws,* 29 HARV. J. L. & PUB. POL'Y 981, 1002-1003 (2006)).

Apart from the statutory construction and *Chevron* issues that call the decision below into question, the majority's decision validated a regulation that impermissibly intrudes into the sovereign powers of a State in violation of established principles of

federalism and the Tenth Amendment to the Constitution.[8] This brief will focus on those issues.

SUMMARY OF ARGUMENT

Adopted by the Framers as a bulwark against federal encroachment upon state sovereignty and individual rights, the Tenth Amendment requires that whatever governmental authority is neither delegated by the Constitution to the federal government "nor prohibited by it to the States" must be "reserved to the States respectively, or to the People." U.S. CONST. amend. X.

The presumption against preemption articulated by this Court in *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947), and its progeny admonishes courts against finding that historic state powers have been superseded "unless that was the clear and manifest purpose of Congress." Under proper application of the Tenth Amendment, this presumption against preemption of state laws warrants heightened emphasis in cases of purported preemption by a federal agency. Such administrative preemption takes place outside the political process safeguards of federalism, which this Court identified in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1987), as the primary source of the states' Tenth Amendment protection. Fundamental to those political process safeguards is political accountability to the electorate, which is present when Congress and

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[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

the President together enact laws but absent when agencies make law by rulemaking. Especially in light of this Court's insistence that Congress provide a "clear statement" to overcome the presumption against preemption, *Gregory v. Ashcroft,* 501 U.S. 452, 460-464 (1991), the political process safeguards that give meaning to the Tenth Amendment demand unmistakably clear evidence of congressional authorization before agency preemption can be upheld. No such evidence exists in the case of 12 C.F.R. § 7.4000, the OCC regulation at issue here. Indeed, far from expressly or even impliedly conferring preemptive authority upon OCC, Congress has repeatedly indicated its desire that state regulation of the sort implicated here remain undisturbed.

Garcia's political process safeguards inform the interpretation of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, pursuant to which only three categories of federal law constitute the "Supreme Law of the Land." Agency rulemaking is not among them. Not designed to represent the interests of the states *qua* states, and unfettered by the requirements of bicameralism and presentment that this Court has insisted be observed for statutes to qualify as "Laws of the United States" within the meaning of the Supremacy Clause, federal agencies may not enjoy preemptive authority for their regulations except in two circumstances: (i) Congress, in compliance with the requirements of Article I, Section 7, has expressly delegated preemptive authority to the agency, or (ii) in compliance with these same requirements, Congress has enacted an expressly or impliedly preemptive statute that the agency is merely interpreting, not, as here, rewriting. As the OCC regulation at issue does

not meet these requirements, it does not preempt state law.

ARGUMENT

I. 12 C.F.R. § 7.4000 IS SUBJECT TO THE PRESUMPTION AGAINST PREEMPTION, WHICH REQUIRES UNMISTAKABLY CLEAR EVIDENCE THAT CONGRESS HAS GIVEN THE AGENCY POWER TO PREEMPT.

The durability of our constitutional system owes much to the ingenious and innovative federalism of the Framers' constitutional design – "the unique contribution of the Framers to political science and political theory." *United States v. Lopez,* 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (citing Henry J. Friendly, *Federalism: A Forward*, 86 Yale L.J. 1019 (1977)). Meticulously providing for the creation and maintenance of multiple centers of concurrent power as an indispensable constitutional object, their design guarantees citizens "two political capacities, one state and one federal, each protected from incursion by the other"–"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Printz v. United States*, 521 U.S. 898, 920 (1997) (citing *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In short, our federalism is about empowerment: a system that contemplates and invigorates alternative (and, at times, concurrent) governmental actors that can, on behalf of the people, solve important social problems.

Federal intervention into the domain of commercial activities traditionally regulated by the states calls into question one of the "oldest questions of Constitutional law," *New York v. United States*, 505 U.S. 144, 149 (1992) – namely, the appropriate spheres of sovereign authority of the federal and state governments and the proper relationship between them in our constitutional system. The Tenth Amendment is a key element in that design.

This Court has emphasized that the power not only to pass laws but to *enforce* them is an essential attribute of sovereignty. *See, e.g., Calderon v. Thompson,* 523 U.S. 538, 556 (1998); *Diamond v. Charles,* 476 U.S. 54, 65 (1986). By seeking to foist "enforcement preemption" on the states and prevent state officials from enforcing their own laws, 12 C.F.R. § 7.4000 not only usurps state sovereign power but engenders confusion among the citizenry as to who is responsible for lackadaisical or non-existent enforcement. Under such a regime, state officials will be held politically accountable for ineffective regulation not of their own making when, forced by federal regulators into inaction, they are prevented from "regulat[ing] in accordance with the views of the local electorate in matters not preempted by federal regulation." *New York v. United States,* 505 U.S. 144, 169 (1992).

The court below avoided the task of identifying and balancing the interests of federal and state sovereigns. In fact, neither the court of appeals nor OCC has made any pretense of identifying conflicting provisions of state law that would justify preemption. Instead, they have cut a broad swath through traditional areas of state sovereignty by ruling out the power of state

officials to enforce their own, non-preempted laws against national banks and their affiliates. So menacing an encroachment on state autonomy and self-governance directly implicates the core concerns of the Tenth Amendment. Those concerns are heightened where, as here, the political safeguards of federalism identified as essential by this Court in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1987) have been circumvented because preemption has been effected without congressional authorization.

This last point cannot be overemphasized. The underlying doctrinal premise of *Garcia* and its vision of the Tenth Amendment is the implicit protection of state interests via their political representation in Congress. *Garcia*, 469 U.S. at 551-52. Such a process-oriented doctrine of constitutional law has no applicability, however, to the dealings of state legislatures and state agencies with federal agencies, where there is no possibility of protection through political representation.

The political process aspect of the Tenth Amendment analysis is highlighted, moreover, by the peculiar position of federal administrative agencies within our constitutional form of government. Unlike Congress, federal agencies do not in any sense represent the states. Agency heads, such as the Comptroller of the Currency, are selected by the President, and agency staff are, by design, supposed to be disconnected from the political arena and serve as sources of technical expertise. *See generally* LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE (1981). As a federal administrative agency, OCC is not accountable to the

electorate and is subject to institutional pressures that tend to make it more likely that state interests will be overlooked or undervalued. For example, OCC largely subsists on fees paid by the institutions it regulates. The ability to generate agency revenues by collecting these fees creates incentives for OCC to encourage more and more banking organizations to opt for the national charter. Those financial incentives make the agency's decision-making process susceptible to error in ways that are not implicated when the decision-maker is an elected, representative body.

Precisely in order to prevent such results, this Court has long recognized a presumption against preemption in traditional areas of State regulation. "[W]e start with the assumption that the historic police powers of the states were not to be superseded * * * unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). *Accord, Bates v. Dow Agrosciences, LLC,* 544 U.S. 431, 449 (2005); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 655 (1995); *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 668 (1993).

The concerns animating and supporting the presumption against preemption are elevated when the preemption is effected not by Congress but by an administrative agency. In such situations, and especially where the agency acts by regulatory fiat, it operates without the political accountability that is vital to this Court's application of the Tenth Amendment. For example, the Court has held that Congress cannot "commandeer the legislative processes of the States by compelling them to enact

and enforce a regulatory program." *New York,* 505 U.S. at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 288 (1981)). If Congress were permitted to commandeer sovereign state resources to accomplish federal goals, "the accountability of both state and federal officials [would be] diminished." *New York*, 505 U.S. at 168. *See also Printz*, 521 U.S. at 920 ("The Constitution contemplates that a State's Government will represent and remain accountable to its own citizens." (citing *New York*, 505 U.S. at 168-169; *Lopez,* 514 U.S. at 576-577 (Kennedy, J., concurring)).

Enforcement preemption – ordering state officials *not* to investigate and enforce violations of concededly non-preempted state laws – constitutes a form of "negative commandeering" that suffers from the very same constitutional defects.

The utter absence of the political accountability component central to this Court's Tenth Amendment jurisprudence raises the bar considerably in agency preemption cases. OCC's regulation is the most disenfranchising type of exercise of purported federal preemptive authority, because it essentially eliminates state and local governmental problem-solvers from the playing field. Intrusions on traditional state authority will only be given effect when a statute's language makes the Court "absolutely certain that Congress intended" such a result. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 172-173 (2001).

Thus, in order to enhance the safeguards of federalism, this Court has recognized, as a gloss on the presumption against preemption, an additional canon of interpretation requiring a *clear statement* from Congress. *Id.* at 460-461. Such a statement would constitute unmistakably clear evidence indispensable to ensuring that courts do not displace state law in the name of a command Congress did not actually enact into law. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1986) (When "Congress intends to alter the balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute") (emphasis added). *Accord, Raygor v. Regents of Univ. of Minnesota,* 534 U.S. 533, 541 (2002); *Gregory*, 501 U.S. at 460; *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989).

The court below conveniently side-stepped the presumption against preemption and the clear statement requirement by asserting that, in the context of banking regulation, the presumption "disappears" because of comprehensive federal legislation and regulation in that field. *Cuomo*, 510 F.3d at 113 (citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 151 (1982) and Second Circuit precedent relying thereon). That position should be rejected for two reasons.

First, bedrock principles of federalism, forged by the Founders and enshrined in the original Constitution and the Bill of Rights only after considerable reflection, debate, and compromise,

cannot be made to "disappear" so easily. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 79 U.S. (7 Wall.) 700, 725 (1869).

Our Constitution is, in fact, "a compact between sovereigns." *New York v. United States,* 326 U.S. 572, 594 (1946) (Douglas, J., dissenting). A federal agency cannot relegate sovereign States to "a mere servile status," *id*. at 595, through selective application of fundamental precepts. Neither do presumptions created by this Court's constitutional jurisprudence – also products of reflection, debate, and compromise – vanish into thin air at the whim of transient lower court majorities.

Second, the Second Circuit's view of the National Bank Act is plain error and its reliance on *de la Cuesta* misplaced. Unlike the Office of Thrift Supervision (and its predecessor, the Federal Home Loan Bank Board), which have been held to enjoy field preemption under the entirely separate regime of regulating federal savings institutions under the Home Owners' Loan Act, OCC does not operate under similar authority and never has. As noted above, neither the language and structure of the National Bank Act (see note 4, *supra*) nor nearly a century and a half of case law interpreting it (see note 7, *supra*) provide any authority whatsoever for the Second Circuit's "disappearing act."

On the contrary, Congress has consistently sought to preserve the dual system of state and federal banking regulation. Among the many examples are Section 7 of the Bank Holding Company Act of 1956,[9] Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980,[10] and the revolutionary Riegel-Neal Interstate Banking and Branching Efficiency Act of 1994.[11] Indeed, the "disappearing act" approach of the majority opinion below is particularly anomalous given Congress' longstanding and oft-repeated expressions of support for the continued vitality of state banking regulation. In the IBBEA, for example, Congress adhered to its unwavering policy of maintaining the balance of Federal and State law under the dual banking system by ensuring that the application of state laws to national banks in the ordinary course of business is an essential element of that policy. It was effectuated by subjecting interstate branches of large, multi-state national banks – like much of the membership of Respondent Clearinghouse – to the laws of their host states in four comprehensive categories: intrastate

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[9] "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846.

[10] 12 U.S.C. § 1831d. After this Court's decision in *Marquette Nat'l Bank v. First of Omaha Serv. Corp.,* 439 U.S. 299 (1978), interpreting 12 U.S.C. § 85, gave national banks a competitive edge in the credit card business, Congress, within two years, enacted § 1831d to redress the balance and give to state-chartered banks everything that § 85 gave to national banks.

[11] Pub. L. No. 103-328, 108 Stat. 2338 (1994) ("IBBEA").

branching, community reinvestment, consumer protection (encompassing, *e.g.*, state anti-predatory lending laws), and fair lending (encompassing state anti-discrimination laws). 12 U.S.C. § 36(f).[12]

In cases of agency preemption then, the Tenth Amendment, in tandem with the presumption against preemption, demands *absolute* legislative clarity in order to ensure that Congress and the President, rather than politically unaccountable agency staff, make the crucial decision to preempt state law. Agencies cannot simply stand in Congress' stead when questions of federalism are at stake. They are not designed to represent the interests of the states, nor do they, and state interests are typically not part of the administrative calculus.

An instructive comparison can be made to the principles of comity and federalism animating this Court's *Burford* abstention doctrine. There federal courts decline to adjudicate matters that, though properly within their jurisdiction, would intrude unnecessarily into matters of importance to the states and disrupt the administration of complex state

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[12] The Conference Report expressly noted the States' "legitimate interest in protecting the rights of their consumers, businesses, and communities. . . .Congress does not intend that the [IBBEA] alter this balance and thereby weaken States' authority . . . ." H.R. Rep. No. 103-651, at 53 (Conf. Rep.) (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074. Tellingly, the Report also stated, "Under well-established judicial principles, national banks are subject to State law in many significant respects." *Id.*

regulatory schemes.[13] So too here, OCC and the federal courts ought to be wary of entering into this arena and disrupting the continuity of comprehensive programs of state regulation. That is especially true where there is every indication that state authorities are at least as well equipped as their federal counterparts to monitor compliance by national banks with state law and to do so without trammeling the OCC's visitorial powers and its independent authority to correct unsafe or unsound practices and bring enforcement actions for violations of law.

In sum, the Tenth Amendment elevates the presumption against preemption in cases involving preemption by agency regulation. In tandem with the "clear statement" rule, what is required is "unmistakably clear" evidence that Congress conferred preemptive authority. For the foregoing reasons, there is no such clarity here, nor can there be. Far from expressly conferring preemptive authority on OCC, Congress has repeatedly indicated its desire that the states continue to regulate in areas such as consumer protection, fair lending, and banking in general.

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[13] *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *See also New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989) (*Burford* abstention appropriate where case "presents difficult questions of law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or if its adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a mater of substantial public concern") (quoting *Colorado R. Water Conservation Dist. v. United States,* 424 U.S. 800, 814 (1976)). *Accord*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726-27 (1996).

II. UNDER *GARCIA'S* POLITICAL PROCESS SAFEGUARDS APPROACH TO THE TENTH AMENDMENT, 12 C.F.R. § 7.4000 CANNOT QUALIFY AS THE SUPREME LAW OF THE LAND.

Preemption through agency regulations such as 12 C.F.R. § 7.4000 undermines the political process safeguards of federalism in another important way. The Framers, through the Supremacy Clause, authorized state law to be displaced solely by three specific types of federal law: the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. CONST. art. VI, cl. 2.

Although there are many instances in which an agency's regulations can be given preemptive effect, in all such cases either the agency is interpreting a statute in which Congress itself has exercised preemptive power, *e.g., Smiley v. Citibank*, 517 U.S. 335 (1996), or else Congress has specifically delegated preemptive authority to the agency, *e.g., New York v. FCC*, 486 U.S. 57 (1988). "[A]n agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986). Nor is the comprehensive nature of mere regulations adequate to confer preemptive effect. "To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state

balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 717 (1985).

Thus, this Court's interpretation of the Supremacy Clause takes into account the same political process safeguards *Garcia* relied upon as the essence of what the Tenth Amendment protects. As noted above, that clause recognizes three categories of law as "the supreme Law of the Land." Elsewhere in the Constitution, the Framers prescribed in detail procedures that were "finely wrought and exhaustively considered," *INS v. Chadha*, 462 U.S. 919, 951 (1983), to govern the adoption of each type of law recognized in the Supremacy Clause. Article V and Article VII establish precise procedures for adopting and amending the Constitution; Article II, Section 2 prescribes the procedures for making Treaties; and Article I, Section 7 sets forth the detailed procedures for adopting "Laws."

The Framers deliberately made the adoption of each category difficult by requiring the assent of multiple participants, all of whom are subject to the political safeguards of federalism.[14] By making federal

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[14] This was particularly true of the Senate, which is the common denominator for all three categories recognized by the Supremacy Clause and which, at the time the Constitution was ratified, was composed of individuals with especially strong ties to the states, given that Senators were directly appointed by the states. Adoption of the Seventeenth Amendment may have attenuated those ties by providing for election of Senators by popular vote, but it has not otherwise diminished the difficulties inherent in making or amending what the Supremacy Clause recognizes as the "Supreme Law of the Land."

law more difficult to adopt, and by giving to those federal institutions designed to serve state interests, such as the Senate, effective veto power over all three forms of potential "Law of the Land," these procedures protect the residual authority of the states and constitute the core of *Garcia's* political process safeguards.

While the Supremacy Clause's most commonly understood function is to declare the preeminence of the enumerated sources of federal law over any state law "to the Contrary," it carries with it a negative corollary as well: State law remains unaffected in the absence of something qualifying as the Supreme Law of the Land. As OCC's visitorial powers regulation does not so qualify, it can effect no preemption. The political process protections of the Tenth Amendment demand nothing less.

Though superficially an unlikely ally for those opposing preemption, the Supremacy Clause contains very specific and illuminating language about what the Framers intended. When it comes to "Laws of the United States which shall be made in Pursuance [of the Constitution]," the only way these can be created is by strict compliance with the bicameralism and presentment requirements of Article I, Section 7. To remove ambiguity, and to prevent Congress from designating a potential "Law" as something other than a "Bill," the Framers included an additional clause which provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to

> the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, *according to the Rules and Limitations prescribed in the Case of a Bill*.

U.S. CONST. art. I, § 7, cl. 3 (emphasis added). That clause, and the specificity and comprehensiveness of the procedures contemplated thereby, would be meaningless if "Laws" capable of preempting state law could be made by other means or by other actors. Clause 3 therefore requires that Article I, Section 7 be regarded as prescribing the exclusive methodology for adopting "Laws of the United States."

This understanding of what is meant by the phrase "Laws of the United States" is structurally[15] confirmed

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[15] The historical evidence is also consistent with this understanding. Three mechanisms for resolving conflicts between federal and state law were introduced at the Constitutional Convention of 1787: (1) giving Congress power "to negative all Laws which they shd. Judge to be improper," James Madison, *Notes on the Constitutional Convention* (June 6, 1787) (quoting Charles Pinckney), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., 1911); (2) giving the Executive branch authority "to call forth the force of the Union [*i.e.*, use military force] agst. any member of the Union failing to fulfill its duty [to comply with federal law]," *id.* at 21 (Madison's notes of May 29, 1787); and (3) giving the judiciary power to treat acts of Congress as "the supreme law of the respective States," *id.* at 245 (Madison's notes of June 15, 1787). The latter became our Supremacy Clause. The decision to designate therein only the "Constitution, . . . Laws . . . made in Pursuance thereof, and . . . Treaties" as "the supreme Law of the Land" rendered them the

by consistent usage of the operative word, "Laws," throughout the text of the Constitution:

- Art. I, § 4, cl. 1 ("Congress may at any time by Law make or alter" regulations governing time, place, and manner for electing Senators and Representatives);

- Art. I, § 4, cl. 2 (Each year Congress shall assemble "on the first Monday in December, unless they shall by Law appoint a different Day");

- Art. I, § 6, cl. 1 ("Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law");

- Art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law");

- Art. II, § 2, cl. 2 (requiring Senate confirmation of "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law," except that "Congress may by Law" exclude the Senate from the appointment of "Inferior Officers");

- Art. II, § 3 (requiring the President to "take Care that the Laws be faithfully executed);

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sine qua non for trumping state law, thereby eliminating the manifest dangers that would attend allowing federal officials to make random judgments about the propriety of state law.

- Art. III, § 2, cl. 1 (providing that the judicial power of the United States extends to all cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority");

- Art. III, § 2, cl. 3 (providing that when a federal crime is "not committed in any State, the Trial shall be at such Place or Places as the Congress may be Law have directed");

- Art. IV, § 1 (providing, in connection with the full faith and credit requirement for "public Acts, Records, and judicial Proceedings of every other State," that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof").

Each of these uses of the term "Law" (or its plural)[16] manifestly refers to legislative action taken in accordance with the procedures mandated by Article I, Section 7.

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[16] While the Constitution does also use the term occasionally to refer to common law (*e.g.,* "at Law or Equity" in Art. III, § 2, cl. 1) or to state law (*e.g.*, art. I, § 10, cl.1 prohibiting states from passing any "ex post facto Law, or Law impairing the Obligation of Contract"), taken in context these references do not call into question what is meant by usage of the term in connection with Laws to be passed by Congress and presented to the President. Obviously, the common law is not made "in Pursuance of" the Constitution, and to suggest that state Laws are treated by the Supremacy Clause as "the Supreme Law of the Land," would ignore the language of that Clause, which contrasts "Laws of any State" with "Laws of the United States . . . made in Pursuance [of the Constitution]."

Indeed, this Court has been assiduous in insisting that Congress comply fully with the procedures prescribed in Article I, Section 7. Congressional efforts to permit legislative branch agents to exercise the legislative power without regard to bicameralism and presentment, and legislation giving the President power to cancel portions of a statute post-enactment, have all been struck down in no uncertain terms. *See INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise,* 501 U.S. 252 (1991); *Clinton v. City of New York*, 524 U.S. 417 (1998).

The administrative lawmaking process is ill-suited to protecting the concerns of the Tenth Amendment and its procedural process safeguards. Unrestrained by the requirements of bicameralism and presentment, federal agencies can promulgate regulations and issue interpretations much more easily than Congress can enact statutes. Moreover, unlike Congress, agencies are not designed to (and, in fact, do not) represent the interests of the states *qua* states. The Framers' "finely wrought and exhaustively considered" lawmaking process, *Chadha*, 462 U.S. at 961, was designed, *inter alia,* to interpose a considerable impediment to federal encroachment on state prerogatives. If agency lawmaking by regulation could displace state law without express congressional authorization, a preemptive rule that could not command a legislative majority could nonetheless become federal law. Worse still, even if an overwhelming majority of both houses of Congress believed that such an agency preemptive rule would unduly trammel state authority, the onus would then be on *Congress* to overcome those same

structural impediments in order to overrule the agency legislatively.

With regard, then, to agency preemption, the political process safeguards of the Tenth Amendment demand strict compliance with the language of the Supremacy Clause before agency regulations can be given preemptive effect. In turn, the net effect of the language of the Supremacy Clause, read in context with the language and structure of the Constitution as a whole, is that no agency regulations can ever be "the Supreme Law of the Land" with preemptive effect *unless* Congress, in compliance with the requirements of Article I, Section 7, has expressly delegated preemptive authority to the agency or has enacted an expressly preemptive statute that the agency is interpreting. In the latter instance, the key concept is interpreting, not, as here, rewriting. OCC's purported "interpretation" of 12 U.S.C. § 484 is not an interpretation at all but a wholesale rewriting of the statute that vitiates the "courts of justice" exception that Congress enacted. Such agency action not only usurps the prerogative of the legislature, *see Dimension Fin. Corp. v. Board of Governors,* 474 U.S. 361 (1986), but is plainly incompatible with the requirements of Article I, Section 7. Accordingly, 12 C.F.R. § 7.4000 can have no preemptive effect and, to the extent it attempts to, should be invalidated.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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